(9)

No. 03-5165

Supreme Court, U.S.
FEB 26 2004
OFFICE OF THE CLERK

In The
Supreme Court of the United States

MARCUS THORNTON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

REPLY BRIEF FOR PETITIONER

FRANK W. DUNHAM, JR.
Federal Public Defender
Counsel of Record

WALTER B. DALTON
GEREMY C. KAMENS
Assistant Federal Public Defenders
FRANCES H. PRATT
Research and Writing Attorney

OFFICE OF THE FEDERAL PUBLIC DEFENDER
1650 King Street, Suite 500
Alexandria, VA 22314
(703) 600-0800
Counsel for Petitioner

Of Counsel
KENNETH P. TROCCOLI
Assistant Federal Public Defender

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

	Page
Table of Authorities	ii
Introduction	1
Argument	3
I. The Approach of the Court of Appeals Is an Unsupported and Unworkable Expansion of *Belton*'s Bright-line Rule	3
A. Neither the Language Nor the Reasoning of *Belton* Support the Approach of the Court of Appeals	4
B. The Approach of the Court of Appeals Is Unworkable	7
II. The Government's Arguments Against the Contact Initiation Rule Are Without Merit	9
III. The Government's Arguments Against an Alternative *Chimel*-based Test Are Without Merit	15
Conclusion	18

TABLE OF AUTHORITIES

Page

CASES

California v. Hodari D., 499 U.S. 621 (1991) 10, 12

Carroll v. United States, 267 U.S. 132 (1925) 7, 12, 14

Chimel v. California, 395 U.S. 752 (1969) ..... *passim*

Florida v. White, 526 U.S. 559 (1999) 14

Illinois v. Wardlow, 528 U.S. 119 (2000) 12

Maryland v. Wilson, 519 U.S. 408 (1997) 13

Michigan v. Chesternut, 486 U.S. 567 (1988) 10

Michigan v. Long, 463 U.S. 1032 (1983) 6, 12, 17

New York v. Belton, 453 U.S. 454 (1981) ..... *passim*

Pennsylvania v. Mimms, 434 U.S. 106 (1977) 13

State v. Gant, 43 P.3d 188 (Ariz. Ct. App. 2002), *vacated and remanded*, 124 S. Ct. 461 (2003), *and superseded by State v. Dean*, 79 P.3d 429 (Ariz. 2003) 10

Terry v. Ohio, 392 U.S. 1 (1968) 12

United States v. Edwards, 242 F.3d 928 (10th Cir. 2001) 16

United States v. Mendenhall, 446 U.S. 544 (1980) 10

United States v. Parr, 843 F.2d 1228 (9th Cir. 1988) 16

United States v. Thornton, 325 F.3d 189 (4th Cir.), *cert. granted*, 124 S. Ct. 463 (2003) 1

CONSTITUTIONAL PROVISION

U.S. Const. amend. IV 3, 9, 14

TABLE OF AUTHORITIES – Continued

Page

STATUTES AND RULES

Sup. Ct. R. 14 15

OTHER AUTHORITIES

LaCrosse (Wis.) Police Dep't, General Orders Manual, Order 1.11 18

Merriam-Webster's Collegiate Dictionary (10th ed. 2001) 7

Phoenix (Ariz.) Police Dep't, Search and Seizure, Operations Order 4.11 18

INTRODUCTION

In *New York v. Belton*, this Court established a bright-line rule that "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." 453 U.S. 454, 460 (1981) (footnotes omitted). In so holding, *Belton* drew on this Court's teachings in *Chimel v. California*, 395 U.S. 752 (1969) – without altering *Chimel*'s "fundamental principles establish[ing] . . . the basic scope of searches incident to lawful custodial arrests" – that the police may search only that area within the immediate control, or reaching distance, of the arrestee. 453 U.S. at 457-58, 460 & n.3; *see Chimel*, 395 U.S. at 763, 766 (limiting scope of searchable area to that area within arrestee's reach).

By its plain terms, then, *Belton* does not apply to the facts of this case: Marcus Thornton had parked and left his car before the police officer even contacted him, let alone arrested him. That is, he was not an "occupant" of the car. Because he was not, he argued below, the search of his car exceeded the scope of *Belton* and of *Chimel*, as the car's interior was not within his immediate control, i.e., reaching distance. The search of the car, therefore, was unreasonable. *See* Pet. Ct. App. Br. 10, 12; Def. Mot. New Trial 4, 6.

The Court of Appeals believed, however, that *Belton* extends to a person associated with and in spatial and temporal "proximity" to a car at the time of his arrest. J.A. 74, 325 F.3d 189, 196 (4th Cir. 2003). Mr. Thornton challenges that expansive reading of *Belton*. The Court of Appeals' proximity approach erases the bright line that *Belton* carefully drew when it limited its holding to

"occupants," and forces courts and officers in the field to ponder vague concepts such as "proximity" and "moments" in deciding whether a search is reasonable.

Perhaps recognizing that the Court of Appeals' approach is amorphous and unworkable, the government attempts to elaborate upon and qualify it. But the government's attempt to salvage the Court of Appeals' approach proves just how amorphous and unworkable it is. In place of *Belton*'s clear and simple rule for "occupant," the government suggests that a search of a car's interior is constitutionally permissible when the police see an arrestee leave his car and "confront him moments later in essentially the same vicinity that the suspect might have occupied if he had been ordered out of the car." Resp. Br. 26-27. Neither the language nor the reasoning of *Belton*'s bright-line rule support this approach. Moreover, because it uses undefined, unfocused, and limitless terms, the approach is unworkable, and therefore unhelpful to citizens, police officers, and judges.

To the extent that the *Belton* bright-line rule needs clarification, the appropriate clarification is that "occupant" means a person occupying a car at the time when an officer initiates contact with him. That person becomes a recent occupant if he leaves the car after contact has been initiated and is thereafter arrested within reaching distance of the car. When contact has been so initiated, an officer may search the car incident to arresting the occupant. As such, the contact initiation rule is fully consistent with the facts of *Belton*, in which contact was made while the defendant was still in the car. And the contact initiation rule focuses, as a bright-line rule should, on facts easily and objectively determinable in both the field and the courtroom.

Another alternative that is both fully consistent with *Belton* and easier to apply than the approach of the Court of Appeals (whether qualified as the government suggests or not) is a limited proximity approach. Under this approach, a person is a recent occupant of a car who, having just left his car, is still within reaching distance of it when arrested. So located, the car is still within his immediate control, as required by *Chimel* and incorporated in *Belton*. Because the search of Mr. Thornton's car did not comport with the *Belton* rule for occupancy, whether expressed as a contact initiation rule, as a limited proximity approach, or even as the government-explained Court of Appeals' proximity approach, that search was unreasonable under the Fourth Amendment.

ARGUMENT

I. THE APPROACH OF THE COURT OF APPEALS IS AN UNSUPPORTED AND UNWORKABLE EXPANSION OF *BELTON*'S BRIGHT-LINE RULE

Belton created a bright-line rule that a search of a car's passenger compartment incident to the arrest of the car's occupant is always reasonable. The *Belton* rule was a categorical application of the principles set forth in *Chimel*. The rule was premised on "the generalization that articles inside the relatively narrow compass of the passenger compartment of an automobile are in fact generally, even if not inevitably, within 'the area into which an arrestee might reach in order to grab a weapon or an evidentiary ite[m].'" 453 U.S. at 460 (quoting *Chimel*, 395 U.S. at 763) (alteration in original).

When the arrestee is not an occupant of a car, the likelihood that the car's passenger compartment is within his reaching distance is considerably reduced, if not eliminated altogether. Nonetheless, the proximity approach adopted by the Court of Appeals greatly expands the automatic suspicionless search authorized by *Belton* by allowing such searches when a person is merely in spatial and temporal proximity to the car when confronted by the police, and should be rejected. *See* Pet. Br. 11-27 (explaining flaws in proximity approach).

In attempting to defend the Court of Appeals' proximity approach, the government claims that a search should be automatically allowed when "the police see [an] individual exit [a] car and confront him, moments later in essentially the same vicinity that the suspect might have occupied if he had been ordered out of the car." Resp. Br. 26-27; *see id.* at 20. This amorphous "might have" test is not supported by *Belton*, and points up the difficulties with the Court of Appeals' approach. More importantly, this "might have" test is inherently unworkable: under it, a "person cannot know the scope of his constitutional protection, nor can a policeman know the scope of his authority." *Belton*, 453 U.S. at 460.

A. Neither the Language Nor the Reasoning of *Belton* Support the Approach of the Court of Appeals

The government claims that the "might have" test it says is incorporated into the Court of Appeals' proximity approach is "built in" to *Belton*. Resp. Br. 26. Quite the opposite is true. By its own terms, *Belton*'s holding was limited to occupants of a car: "[W]e hold that when a policeman has made a lawful custodial arrest of *the*

occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." 453 U.S. at 460 (emphasis added) (footnotes omitted); *accord id.* at 454 (stating question presented).

To make its claim that *Belton* really meant to state a rule for situations other than arrests of car occupants, the government (as did the Court of Appeals) must look away from *Belton*'s holding and focus on the single occurrence of the word "recent" in the opinion. Indeed, the government inaccurately describes *Belton* as holding that "police may search the passenger compartment of a vehicle whenever an 'arrestee is its recent occupant.'" Resp. Br. 8. As stated above, however, that is not what *Belton* held. Moreover, the government's argument ignores the obvious: that the suspects in *Belton* were recent occupants of their car only because they had been stopped by the police while they were in it, and that the police did in fact order them out. 453 U.S. at 455-56. Finally, even if the single reference to "recent occupant" in *Belton* could expand the decision's clear holding, that reference cannot reasonably be read as building into the bright-line, objectively-based occupant rule an exception for those cases in which an officer subjectively believes that he would have searched the car if he might have stopped the car and might have ordered the person out of the car to a place where that person might have been within reaching distance of the passenger compartment.

The "might have" test also ignores *Belton*'s clear language that it was adhering to the principle that this Court established in *Chimel*, namely that the police may search only that area within the immediate control, i.e., reaching distance, of the arrestee. *Belton*, 453 U.S. at 460

& n.3. Applying *Chimel*'s precepts to situations involving cars, *Belton* teaches that the police can search the entire passenger compartment of the car only when they arrest the occupant while that occupant is within reaching distance of the car. A police officer, however, in ordering a person out of a car, will almost certainly order the person to move some distance from the car, to reduce the risk of danger to the officer. That order may place the person outside of reaching distance. A police officer can, and should, protect himself this way. But by ordering the person to move out of reaching distance of the car before arresting him, the officer has obviated the automatic suspicionless search rule created by *Belton*, and therefore cannot rely upon it as the basis for any subsequent search of the car. *See also* Pet. Br. 26.

Consequently, the "might have" test for determining who is a recent occupant of a car finds no support in the reasoning of *Belton*, and therefore does not serve the interests it invokes. The dual rationales of officer safety and evidence preservation, *see* 453 U.S. at 457, provide much less support for that test than they do for the original *Belton* rule. This is clear when *Belton* is read in context. As to officer safety, an officer needs *Belton*'s justification only where he has no reasonable suspicion of any danger to himself – that is, where *Michigan v. Long* does not apply.[1] *See* 463 U.S. 1032 (1983). Similarly, as to evidence preservation, an officer needs *Belton*'s automatic

[1] The government makes much of *Long*'s passing reference to *Belton*, Resp. Br. 17-18, but even assuming that the reference was meant to be more than mere dicta, it does not support the government's test. *See* Pet. Br. 21-23.

search rule only when he does not have probable cause to search the car, that is, where *Carroll v. United States* does not apply. *See* 267 U.S. 132 (1925).

B. The Approach of the Court of Appeals Is Unworkable

The *Belton* Court took care to shape an easily-defined, objectively-determinable "workable" rule that would assist both citizens and officers in understanding the law applicable to a recurring factual situation. 453 U.S. at 460. The Court of Appeals' proximity approach, as qualified by the government's "might have" test, contains at least three vague, undefined, subjective and unworkable terms: "moments," "essentially the same vicinity," and "if he had been ordered out of the car." "Moments" is by definition an unspecified amount of time. *See, e.g., Merriam-Webster's Collegiate Dictionary* 748 (10th ed. 2001) (describing "moment" as "a comparatively brief period of time"). A test defined in "moments" is inherently vague and antithetical to a bright-line rule. The "essentially the same vicinity" component poses an equally perplexing task for the officer in the field. "Vicinity" is a non-specific, open-ended term, subject to interpretation. Modifying "vicinity" with "essentially" only increases the subjectiveness of the description further, and thus increases the practical difficulty of applying the Court of Appeals' approach. Finally, the "if he had been ordered out of the car" component requires the officer to speculate about what the driver would have done had his exit from the car been at the officer's direction.

The undefinable nature of these terms leaves citizens and police officers alike without guidance. Each encounter with a person associated with a car will turn on the

officer's subjective perceptions of how he might have acted if the facts were other than what they are.[2] And those perceptions will necessarily be subject to post hoc reconsiderations. Courts would have to decide (1) whether the officer intended to order the person out of the car (as opposed to simply speak with him through the window, or have a consensual encounter on the street); and (2) if so, where the officer might have intended to have this encounter. It is ironic that the government advocates a test involving post hoc speculation when it criticizes the contact initiation rule for requiring ad hoc determinations by police officers that are "subject to second-guessing by a court." Resp. Br. 22.

The unworkability of the Court of Appeals' proximity approach, particularly as explained by the government, is borne out when it is applied to the facts of this case. Here, the government cannot pinpoint with any degree of specificity where the stop occurred, or how long after Mr. Thornton left his car that it occurred. And the government certainly cannot say, "essentially" or otherwise, whether the stop occurred in the same place it would have occurred had Officer Nichols ordered Mr. Thornton out of his car – or even *if* Officer Nichols would have ordered Mr. Thornton out of his car if the officer had reached him before he left it. In short, even if its own test were applied to this

[2] It is ironic that the government advances an undefinable rule allowing automatic searches when the officer believes he might have been able to search had the facts been different, while at the same time criticizing the contact initiation rule as "subjective." Resp. Br. 22-23. More importantly, as the government's own amici point out in their brief, "police officers' subjective intentions rarely factor into Fourth Amendment analyses." Resp. Amici Br. 20 (citing cases).

case, the government would not be able to carry its burden of proof that the search of Mr. Thornton's car was not unreasonable under the Fourth Amendment.

II. THE GOVERNMENT'S ARGUMENTS AGAINST THE CONTACT INITIATION RULE ARE WITHOUT MERIT

Under the contact initiation rule, a police officer may conduct an automatic search of a car when the officer has initiated contact with the person while he is in the car and the officer subsequently arrests the person while he is either still in the car or within reaching distance of it. In contrast to the approach taken by the government and the Court of Appeals, the contact initiation rule is grounded in *Belton*, is straightforward, and is easy to apply.

The government first erroneously argues that the contact initiation rule has "no foundation" or "support" in *Belton*. Resp. Br. 6, 18. To the contrary, *Belton* is itself a contact initiation case. Belton was in the car when stopped, he was ordered out of the car by the trooper, and he was then arrested by that officer. This Court upheld a search of the car that Belton had occupied. If, as the government contends, *Belton* is a case about "recent occupants," then those recent occupants must be limited to those persons who were in the car at the time the police initiated contact and who were subsequently arrested while within reaching distance of the vehicle.

The government further criticizes the contact initiation rule as being a subjective, ad hoc test, claiming that the rule turns on the arrestee's awareness of the police presence and the arrestee's reasons for leaving the car. Resp. Br. 22-23. This claim has no merit. The contact

initiation rule simply has no subjective component. It turns on whether the officer took some action to initiate contact, not on whether that contact was understood as such by the occupant of the vehicle. If there is a subsequent dispute as to whether contact was in fact initiated, the test would be whether an objectively reasonable person would find that the officer had initiated contact. As such, its focus is on the perspective of a reasonable person, in just the same way as the analogous question of when a seizure occurs. As this Court said of the seizure test in *Michigan v. Chesternut*, its "objective standard – looking to the reasonable man's interpretation of the conduct in question – allows the police to determine *in advance* whether the conduct contemplated will implicate the Fourth Amendment." 486 U.S. 567, 574 (1988) (emphasis added). "This 'reasonable person' standard also ensures that the scope of the Fourth Amendment protection does not vary with the state of mind of the particular individual being approached." *Id.*; *see also United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (seizure test is objective); *California v. Hodari D.*, 499 U.S. 621, 628 (1991) (*Mendenhall* objective test focuses on whether the officer's words and actions would have conveyed seizure to a reasonable person).[3]

[3] To the extent that other courts have arguably included a subjective component in a contact initiation test, neither Mr. Thornton nor this Court are bound by such a formulation. Further, while the government relies on *State v. Gant* to support its claim that the contact initiation rule is subjective, Resp. Br. 23 & n.6, the test announced in that case contained an objective component as well. *See* 43 P.3d 188, 193 (Ariz. Ct. App. 2002) (stating that "the record does not support a finding that Gant was *or should have been* aware of anyone's approach as he exited his vehicle") (emphasis added),

(Continued on following page)

The contact initiation rule sets a similarly objective, clear standard. A court would merely determine whether a reasonable objective person would find that the officer had signaled contact. As for the officer, at the time of contact, he knows whether he employed overhead lights, high beams, a siren or a loudspeaker, made a clearly audible oral statement, or even used a flashlight to look into the car. All of these actions would meet this objective test. If the occupant exited for any reason after such objective conduct, and was subsequently placed under arrest while within reaching distance of the car, the *Belton* automatic search rule would apply.

By focusing on whether an occupant exits a car voluntarily or at police direction, the government incorrectly characterizes the contact initiation rule as an "exiting" test. *See, e.g.*, Resp. Br. I, 6, 16-17, 19, 20, 21, 27. It does so in another unsuccessful attempt to portray the test as involving subjective considerations. As noted, however, the contact initiation rule asks simply whether an officer objectively signaled contact to the occupant of a car. Once contact is signaled, it is immaterial whether the occupant exits the car afterward. Just as the exit is immaterial, so are the occupant's subjective motives for exiting the car. The government is therefore incorrect when it suggests that an officer would have to evaluate those motives or have to decide whether the "arrestee was impaired in a manner that could have affected his awareness of the police." Resp. Br. 22.

vacated and remanded, 124 S. Ct. 461 (2003), *and superseded by State v. Dean*, 79 P.3d 429 (Ariz. 2003).

The government next argues that the contact initiation rule, while difficult for police officers to apply, will spur criminal suspects to jump out of their cars prematurely to avoid a *Belton* search. Resp. Br. 23-24, 25; *see also* Resp. Amici Br. 22. The contact initiation rule creates no such paradox. Trained officers will be easily able to apply the rule, and, should criminal suspects become aware of the rule, it is likely that jumping out of a car and hurrying away would contribute to reasonable suspicion justifying an investigative stop of them. *See Illinois v. Wardlow*, 528 U.S. 119, 124-25 (2000); *cf. California v. Hodari D.*, 499 U.S. 621, 623 n.1 (1991) ("That it would be unreasonable to stop, for brief inquiry, young men who scatter in panic upon the mere sighting of the police is not self-evident, and arguably contradicts proverbial common sense. *See* Proverbs 28:1 ('The wicked flee when no man pursueth').").

The contact initiation rule will be easier for officers to apply than other non-bright-line rules they must use all the time. Each day, all around this country, police officers must decide on the facts before them and on the spur of the moment whether they have reasonable suspicion to stop and frisk a suspect, reasonable suspicion to search a car for safety purposes, or probable cause to search a car for contraband. *See Terry v. Ohio*, 392 U.S. 1 (1968); *Michigan v. Long*, 463 U.S. 1032 (1983); *Carroll v. United States*, 267 U.S. 132 (1925). These and many other familiar situations require officers to evaluate a number of factors and balance them in mere seconds.[4] By comparison

[4] The government's amici argue that "[p]olice should not be required to memorialize what they intended or attempted to do to get

(Continued on following page)

to these tests, the contact initiation rule involves no balancing at all.

The government and its amici further complain that the contact initiation rule may compromise officer safety and surveillance activity. Resp. Br. 24-26; Resp. Amici Br. 14-18. Both arguments assume that a contact initiation rule forces officers to take particular actions. But that is not true; nothing about the contact initiation rule would force any action on the police.

For his safety, an officer may choose, as Officer Nichols did in this case, not to initiate contact when a person is in his car. Mr. Thornton acknowledges the wisdom of that action. As this Court has recognized, there can be "inordinate risk" when an officer approaches a person seated in a car. *Pennsylvania v. Mimms*, 434 U.S. 106, 110 (1977). That risk has been reduced by allowing an officer to order both the driver and any passengers out of a car, *id.* at 111; *Maryland v. Wilson*, 519 U.S. 408 (1997), as well as by *Belton*, which allows an automatic search even when the officer has no reasonable suspicion of any danger.

The officer is free to reduce that risk even further by confronting a person after he has left the car and moved away from it. But by lessening the risk, the officer has also obviated the need for *Belton*'s rule.[5] What the officer

an occupant's attention." Resp. Amici Br. 20. But officers already must memorialize their bases for believing they have reasonable suspicion or probable cause. This situation is no different.

[5] Rejecting the expansion of the automatic suspicionless search rule in these circumstances does not leave a police officer without recourse for searching a car that he believes should be searched. *See* Pet. Br. 34 and cases cited therein.

should not be able to do, however, is to take advantage of the automatic suspicionless search granted under *Belton* after he has eliminated the reasons (officer safety and evidence preservation) for that search by placing the suspect outside of reaching distance from the car.

Similarly, an officer who decides that continued surveillance and investigation are the primary considerations is free to continue that surveillance and investigation. By making that choice he may forego a chance for an automatic suspicionless search, but he is free to make that choice. Further, he retains other options for searching the car. In fact, the longer the undercover officer watches the car, the greater the likelihood that he will develop probable cause to search or seize it. *See Carroll v. United States*, 267 U.S. 132, 149, 155-56 (1925); *Florida v. White*, 526 U.S. 559, 561 (1999).

Belton is undeniably and properly justified by concerns for officer safety and the desire to preserve evidence. *See* 453 U.S. at 457-58. But at some point in both scenarios described above, the danger to the officer becomes so remote, and the search for evidence so attenuated, that the Fourth Amendment, standing as it does as a safeguard against unreasonable intrusions into homes, persons, and effects, must take precedence over an officer's desire for the "free" search that *Belton* bestows. The contact initiation rule provides a clear, simple, and safe means of determining where to draw that line.

III. THE GOVERNMENT'S ARGUMENTS AGAINST AN ALTERNATIVE *CHIMEL*-BASED TEST ARE WITHOUT MERIT

Mr. Thornton argued in his opening brief that if this Court rejects the contact initiation rule as a means of defining who comes within *Belton*'s automatic search rule, it should limit *Belton* to those cases in which a person who, having just left a car, remains within reaching distance of it at the time of arrest. Pet. Br. 10, 35-36 (proffering "limited proximity approach"). The government asserts that Mr. Thornton has waived this alternative argument, and that the argument lacks merit. Both assertions are meritless.

As to the first assertion, Supreme Court Rule 14.1(a) provides that "[t]he statement of any question presented is deemed to comprise every subsidiary question fairly included therein." The government states the question presented in this case as "[w]hether a police officer may search the passenger compartment of an automobile as a contemporaneous incident of the lawful custodial arrest of the vehicle's recent occupant when the arrestee exited the vehicle voluntarily rather than on police direction." Resp. Br. I. The government would answer this question in the affirmative, provided that the officer sees the person leave the vehicle, confronts him within moments, and confronts him in essentially the same place he would have been had he been ordered out of the car. *Id.* at 20, 26-27. Mr. Thornton would answer negatively, unless the officer either initiates contact while the arrestee was in the car (the scenario in *Belton*), or arrested the occupant within reaching distance of it (the rationale behind *Chimel*). Pet. Br. 29-35, 35-36. The government may dispute Mr. Thornton's answer, but it is specious for the government to argue

that its answer is encompassed within its question presented (or as presented in the petition for certiorari), but Mr. Thornton's is not. This is particularly so where, as Mr. Thornton argued below, the search of his car was unlawful because it exceeded the scope of *Belton*, and therefore of *Chimel*, because, as he was no longer an occupant of the car when the police first approached him, the car's interior was not within his immediate control, that is, it was outside of his reaching distance. Pet. Ct. App. Br. 12; Def. Mot. New Trial 6.[6]

[6] The government's waiver argument is curious in light of the considerable time it spends on an issue that is even farther afield: whether an officer may conduct a *Belton* search after having handcuffed the arrestee and secured him in the patrol car. *See* Resp. Br. 35-39. The government argues the point at length, despite its acknowledgment that it was not challenged below, *id.* at 35, and "is not presented by this case," *id.* at 39. In contrast, Mr. Thornton's "limited proximity" argument was made necessary by the ruling of the Fourth Circuit, which used "proximity" as a basis for expanding *Belton* but placed no workable limits on that expansion.

As to the merits of the patrol car issue, the government is correct that Mr. Thornton did not challenge the applicability of *Belton* where the arrestee has been removed from his automobile and placed in a patrol car before the search of his car is conducted. Resp. Br. 35. In that situation, the mere placement in the patrol car on the scene does not rescind *Belton*'s applicability. That is, once *Belton* is triggered by an arrest inside a car or within reaching distance of it, an automatic search of the car is permissible even though the arrestee is later moved to the inside of a police car on the scene. That said, if *Belton* does not apply in the first instance, then a search of the arrestee's car incident to his arrest is impermissible regardless of whether the arrestee has been moved to the inside of a patrol car. *See, e.g., United States v. Edwards*, 242 F.3d 928, 938 (10th Cir. 2001) (finding *Belton* inapplicable, and search pursuant thereto invalid, where the arrest occurred 100-150 feet away from the searched car); *United States v. Parr*, 843 F.2d 1228, 1231 (9th Cir. 1988) (*Belton* search invalid where the defendant was not

(Continued on following page)

The government's substantive criticisms of the limited proximity approach likewise have no merit. The government first argues that "neither *Belton* nor the considerations on which it rests supports petitioner's alternative argument" and that the limited proximity approach, "if adopted, would all but eviscerate *Belton*'s bright-line rule." Resp. Br. 32-33. To the contrary, *Belton* was clearly based on the assumption that an arrestee *is* in fact within reaching distance of the car of which he was a recent occupant: because the lower courts had "found no workable definition of 'the area within the immediate control of the arrestee' *when that area arguably includes the interior of an automobile* and the arrestee is its recent occupant," this Court had to determine how much of the interior could be searched. *Belton*, 453 U.S. at 460 (emphasis added). If the arrestee is more than reaching distance away from the car, then the car's interior cannot, even "arguably," be within his immediate control. Based on the assumption that an arrestee would be within reaching distance of the car when arrested, the *Belton* Court held that the entire passenger compartment would be deemed to be within the occupant's immediate control.[7]

The government suggests further that the limited proximity approach should not be the test for recent occupancy because police need a clear rule to apply in the

under arrest at the time of the search, but was merely detained in the patrol car).

[7] The limited proximity approach also is consistent with *Michigan v. Long*, 463 U.S. 1032 (1983), in which this Court suggested that the officers in that case would have been authorized to search Long's car had they arrested him for speeding or driving while intoxicated because he was within reaching distance of his car. *See* Pet. Br. 22-23.

field, not one that courts will review after the fact. Resp. Br. 33-34. But "reaching distance" *is* the test in all other search-incident-to-arrest scenarios pursuant to *Chimel*. This test is familiar to police, and, as more than thirty years of application in the field has established, works perfectly well. *See, e.g.*, Phoenix (Ariz.) Police Dep't, Search and Seizure, Operations Order 4.11, § 7.C(1) ("Search[es] beyond the person must be limited to those areas that remain within the reach of the arrestee."); LaCrosse (Wis.) Police Dep't, General Orders Manual, Order 1.11, § VIII.D (limiting scope of search incident to arrest to arrestee's person and "an area within the person's immediate presence"); *id.* § VIII.E ("The area within an arrested person's immediate presence can be defined as that area within lunge, reach, or grasp of the person at the time of the arrest."). For this reason, the government amici's concerns about "unwarranted nuances of proof" are unfounded. Resp. Amici Br. 22. "Reaching distance" is a well-understood concept that is routinely applied by the police and the courts. It is a concept that will prove equally routine in the context of car searches.

CONCLUSION

Belton created a bright-line rule authorizing an automatic suspicionless search of the entire passenger compartment of a car when an occupant of that car has been arrested within reaching distance of the vehicle. It is precisely because that line must remain bright that this Court should not countenance its blurring and expansion by the Court of Appeals. Such an expansion uncages the search-incident-to-arrest exception, allowing it to swallow the rule. Conversely, the contact initiation rule and the

limited proximity approach, both rejected by the Court of Appeals, properly cabin *Belton*'s exception while holding true to *Belton*'s twin rationales, officer safety and evidence preservation. Neither of these rationales are impaired, and indeed, they are enhanced, under the approaches Mr. Thornton advocates. For these reasons, and those stated in Mr. Thornton's opening brief, this Court should reverse the judgment of the Court of Appeals and not allow *Belton* to roam free without restraint.

Respectfully submitted,

FRANK W. DUNHAM, JR.
Federal Public Defender
Counsel of Record

Of Counsel
KENNETH P. TROCCOLI
Assistant Federal Public Defender

WALTER B. DALTON
GEREMY C. KAMENS
Assistant Federal Public Defenders
FRANCES H. PRATT
Research and Writing Attorney

OFFICE OF THE FEDERAL PUBLIC DEFENDER
1650 King Street, Suite 500
Alexandria, VA 22314
(703) 600-0800
Counsel for Petitioner

February 2004